United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1037

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B/S

UNITED STATES OF AMERICA, APPELLEE

v.

RAYMOND COUGHLIN, CHARLES GREENE,
ALBERT GRASSO, NEIL PACILLO,
CARMINE PICCORA AND FRED SMITH, APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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No. 75-1037

UNITED STATES OF AMERICA, APPELLEE

v.

RAYMOND COUGHLIN, ALBERT GRASSO, CHARLES GREENE, NEIL PACILIO, CARMINE PICCORA AND FRED SMITH, APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support defendants' conspiracy convictions.

2. Whether the prosecutor's conduct, examination of witnesses and closing argument were proper.

3. Whether various rulings of the court were correct.

4. Whether the court coerced a verdict.

STATEMENT

I. Introduction

A fourteen-count indictment returned on September 12, 1973, in the United States District Court for the Eastern District of New York charged the six defendants-appellants (hereafter "defendants") and sixteen codefendants with conspiracy and various substantive counts involving theft of frozen seafood from New York

piers, in violation of 18 U.S.C. 2, 371, 549, 649, 1962 and 2314. Co-defendants Bencivenga, Lester, Lofton and Ruggiero pleaded to one count of seafood theft and testified for the government at defendant's trial in May - July 1974 (Tr. 1402-1417, 1428, 2015-2018, 2465, 2872).[1/] Co-defendants Agnello, Gillis, Langella, Pasquale Macchirole, Alfred Smith, Spadafora and Suarez were severed and are awaiting trial.

Specifically, the conspiracy charged began in 1964 or 1965 when a meeting was called by defendant Pasquale Macchirole at Frigid Express (hereinafter referred to as "Frigid"), a Jersey City trucking company. At that meeting truck drivers were instructed that henceforth they had to turn over to Frigid half of any profits obtained from stealing seafood at the piers. From 1964 to 1972 the driver-thieves would load extra cases of seafood on their trucks, after paying off the men who tallied the loads, or else would steal the cases outright. In April 1972 a new method of stealing was devised: drivers would alter tallies of loaded seafood prior to signing out from the pier. When they returned to Frigid the cases would then be "slacked" (customarily

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1/ "Tr." refers to the transcript of the 11-week trial before Judge Mark A. Costantino. The transcript is sequentially numbered beginning with page 146 on May 16, 1974. The May 13 proceedings were apparently transcribed in two separate volumes, the more complete of which, numbered 1-154, we cite in this brief. The morning proceedings of May 15, are numbered 1-82; the afternoon proceeding of that same day are numbered 1-63.

by removing a number of cartons from various cases) in order to accurately reflect the alterations on the tallies. The shrimp would then be sold, with Frigid and the drivers splitting the profits.

Defendants were jointly tried before a jury with codefendants Bamonte, Conte, Danduono, Questal and John Macchirole.[2/] Defendant Coughlin was convicted on Counts 10 (September 22, 1972, theft of seafood) and 14 (conspiracy); he was sentenced to concurrent 18 month terms of imprisonment. Defendants Greene, Grasso, Pacilio, Piccora, and Smith were convicted only on the Count 14 conspiracy charge. Greene and Smith were each sentenced to 2 years' imprisonment and Piccora to 3 years' imprisonment, all but 6 months of which sentences were suspended; Grasso was sentenced to 18 months' imprisonment; Pacilio to 30 months' imprisonment and fined $2,500.

2/ At the close of the government's case, the Court with the government's consent dismissed Counts 3, 6, 9, and 12(interstate transportation of stolen seafood, 18 U.S.C. 2314) for want of proof of the $5,000 jurisdictional amount (Tr. 4560-4561). Over the government's objection the court dismissed Counts 2, 5, 8 and 11 (theft from customs custody, 18 U.S.C. 549) (Tr. 4649-4653) and Count 13 (pattern of racketeering activity, 18 U.S.C. 1962) (Tr. 4651-4653). The court also expunged subdivisions 2 and 3 of Count 14 (conspiracy), which referred to the dismissed §549 and §2314 charges (Tr. 4651 and 4652). All counts against Conte, Danduono and Questel were also dismissed (Tr. 4649). Only Counts 1, 4, 7, 10 and 14 regarding Bamonte, Coughlin, Grasso, Greene, Macchirole, Pacilio, Piccora and Smith went to the jury; and the jury acquitted Bamonte and Macchirole on all counts.

Prior to the close of the government's case the government profferred Herwin Gold from the Regional Office of the United States Customs to testify regarding customs procedures concerning (Footnote cont'd.)

As to all defendants, sentences were stayed pending appeal.

II. Evolution of the Seafood Conspiracy

1. General Outline. The early stages and evolution of the seafood conspiracy were detailed at trial by government witness John Valentine, who drove a truck for Frigid throughout most of the period charged (1964-1973). Prior to 1964 or 1965 Valentine stole frozen fish from the piers and kept all the profits for himself (Tr. 3363).

One morning in 1964 or 1965, upon arriving at Frigid about 8:00 a.m., Valentine was told that Pasquale "Paddy Mack" Macchirole wanted to talk to all the drivers (Tr. 3237, 3372-3375). By the time Macchirole arrived at 9:30 a.m., some 25 drivers, including Pacilio,had gathered in the upstairs front office of Frigid (Tr. 1942, 3364-3365, 3373-3374). Macchirole told the drivers:

> he wasn't going to give us the trucks and get rich, not on his trucks. He said, From now on, things are going to be changed. None of us are supposed to sell anymore shrimp no more. When you get shrimp, bring them downstairs and put them in the cooler, and I'll sell them

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2/ (Footnote Cont'd.)
the delivery of frozen seafood from ships docked at the New York piers (Tr. 4506-4507). The court stated: "We've had everybody come in and tell us that they take it from the ship to the pier, from the pier to the truck, and so on" (Tr. 4507). The court further suggested a stipulation as to Gold's testimony and agreed to take judicial notice of the customs regulations contained in 19 C.F.R. 158.1 (Tr. 4507-4508). The government thereafter rested subject to stipulations (Tr. 4520). The court's dismissal of the customs counts came prior to the entering of the final stipulations (Tr. 4798-4805). Since the counts involving theft from customs custody had already been dismissed, no stipulation was entered into regarding the testimony of Herwin Gold.

and pay you (Tr. 3365-3366). 3/

The drivers were then brought one by one into Macchirole's private office (Tr. 3374). When Valentine entered the office Macchirole asked him if he was making any money (Tr. 3374). Valentine told Pasquale Macchirole about a deal he had with Pacilio and others to obtain extra cases at the piers (Tr. 3375). 4/ Macchirole told Valentine (as well as the other drivers) "If you make a dime, I want a nickel of that" (Tr. 3366, 3377-3378).

As a result of the conversation, and seeking to avoid paying

3/ It's unclear from Valentine's testimony whether Macchirole issued this order to the drivers collectively or individually.

4/ Valentine testified that at the time of the meeting most drivers were paying the checkers, or cargo counters, on Pier 10 $15.00 for a case of stolen shrimp (Tr. 3366). After paying the checkers, they would drive to Frigid where the stolen cases would be removed and put in cold storage (Tr. 3366-3368).

The procedure for unloading frozen seafood at the piers was as follows. When cargo was delivered, a checker would count the cargo and check the markings on it (Tr. 887-888, 977, 1042-1043, 1065, 1083, 1124, 1135, 1189, 1275-1276). The checkers would get a delivery order from the dock boss and then get a team from the extra labor men (Tr. 886). A team consisted of a hi-lo (forklift) driver and a "footman" (Tr. 886). The checker would give the order, on which was written the location of the cargo, to the hi-lo driver (Tr. 886). The hi-lo driver would bring the cargo to the truck and stack it so that the checker could count it (Tr. 887). The checker would then take a count of the cargo (Tr. 887). If any of the cargo had been broken in transit the checker would get a cooper; the cooper would count the damaged cargo and the checker would record the resulting amount on his cargo tally (Tr. 888-889). The cargo would then be loaded on the truck (Tr. 888-889). When the tally was completed it would be given to the truck driver (Tr. 889).

Frigid half his profits, Valentine began to sell his own stolen merchandise (Tr. 3378). When pressed, Valentine did bring some back to Frigid (Tr. 3378-3379). He would place the shrimp in the cold storage room at Frigid where it would be turned over to defendant Piccora and codefendant Questal (Tr. 3379). Valentine's "split" with Frigid continued from 1965 to 1972 (Tr. 3379).

Between 1965 and 1972 Valentine had many conversations with Pacilio regarding Pasquale Macchirole's demands (Tr. 3249-3252). During the first conversation in 1964 or 1965 Pacilio asked Valentine for money on behalf of Macchirole (Tr. 3252-3253). Thereafter, Valentine sometimes gave money and at other times gave shrimp as Macchirole's cut. Macchirole's cut from Valentine's thievery always went through Pacilio (Tr. 3253-3255), who occasionally would also help load the stolen seafood on the trucks (Tr. 3253-3254, 3397). According to Valentine, every Frigid driver was involved in the stealing (Tr. 3395).

2. The 1967 incident involving defendant Grasso. In February 1967, Valentine's truck loaded with 984 cases of shrimp, 84 of which Valentine had stolen, became snowbound for three days (Tr. 3382). After it was pulled out of the snow, a checker from a cold storage warehouse was sent out to count the shrimp (Tr. 786, 3382). Valentine told the checker he had only 900 cases in his trailer (Tr. 3382). Valentine then telephoned "Georgie" Ghee, the contractor for whom Valentine was then working, and explained

to Ghee about the discrepancy in his load. Ghee said that he would send someone over (Tr. 3383). About 45 minutes later Grasso arrived, looked at the checker, and said, "Oh, hell, I know him [the checker]. He is from Staten Island" (Tr. 3383-3384, 3389). The checker and Grasso went to the West Boondock Bar together; they were followed there by Valentine (Tr. 3384-3389). Grasso told Valentine not to worry about the discrepancy in the count, saying "I have got a thousand dollars. This is in the bag" (Tr. 3384, 3391). That afternoon, when Valentine finished unloading the 900 cases, he drove back to Frigid with the remaining 84 (Tr. 3384-3385). Grasso, Ghee and Valentine unloaded the 84 cases, handing them to Piccora and Questel, who "put them in the box" or Frigid freezer (Tr. 3385).

3. The June 1968 incident involving defendants Pacilio, Smith and Piccora. In June 1968, defendant Smith loaded 80 cases of stolen shrimp on Valentine's truck at Pier 42 with a high-lo (Tr. 3256-3257). Valentine then drove to Frigid where he met Bencivenga, Ghee, Pacilio and Smith (Tr. 3258-3260, 3262). They unloaded Valentine's truck, passing the stolen shrimp to Piccora and Questel (Tr. 3260-3262).

The following Saturday morning, Pacilio gave Valentine $500 in one dollar bills for the 80 cases; earlier in the week Pacilio had given $800 to Valentine's girlfriend at Valentine's request (Tr. 3263, 3269-3275, 3639). When Valentine complained about

the amount, Pacilio replied "What did you expect? There's Paddy on the top, and G[hee] got to get his" (Tr. 3269, 3277). At the time of the payoff Pacilio was carrying an adding machine tape listing the amounts due various persons (Tr. 3270, 3276). Pacilio showed Valentine the tape and said, "If you don't want this [the $500 payment] I'll take it back" (Tr. 3276). Valentine took the money and left (Tr. 3276).

4. The May 1970 incident involving defendants Pacilio, Greene and Piccora. In May 1970, after a pick-up on Pier 11, Valentine backed an empty trailer up to a loaded trailer and Valentine and defendants Greene, Pacilio, Piccora, and three other named individuals slacked cases throughout the night (Tr. 3340-3342). The cartons were ripped open and dumped (Tr. 3342). Valentine went to sleep at 3:00 a.m. and awoke at 6:00 a.m. as Greene and two other drivers were pulling off to make delivery (Tr. 3343).

III. The 1972-1973 Phase of the Seafood Conspiracy.

1. General outline. Evidence at trial regarding the final years of the conspiracy focused mainly on thefts at Brooklyn Pier 11. The evidence consisted of documentary evidence (tallies, photographs of drivers, delivery cash records etc.) as well as testimonial evidence from codefendants Bencivenga, Lester, Lofton and Ruggiero (all of whom had entered guilty pleas) and from unindicted

coconspirator Dawson.[5/] For purposes of this appeal, delineation of all the documentary and testimonial evidence relating to the 1972-1973 phase of the conspiracy is unnecessary. Therefore, our description of the 1972-1973 period will be restricted to a detailed account of certain incidents within this period which clearly demonstrate defendants' participation in the conspiracy charged.

As noted above, p. 2-3, beginning in 1972 the seafood thieves devised a new method to cover up the thefts. The drivers would alter tallies of their seafood loads prior to signing out from the piers. Later, at Frigid, the loads would be slacked (customarily by removing one or more of the ten 5 lb. units comprising a case of seafood) to reflect the alterations on the tallies.

At trial, the procedure at Pier 11 for unloading frozen seafood from the ships and loading the seafood on the trucks was described in detail. When a truck driver arrived at Pier 11, a watchman would make out a gate pass and take a corresponding photograph of the driver with a regiscope machine (Tr. 500-509, 1433-1435). The driver would then clear customs and load his truck while the checker tallied the cargo, making certain that the tally ticket contained the company number and license plate of the truck used, the date, the amount of cargo and any exceptions

5/ Ruggiero was the head delivery clerk at Pier 11, Bencivenga a brother-in-law of defendant Pacilio.

noted on the tally (Tr. 506-507, 1433-1436). After the checker signed the tally, he returned it to the driver, along with the delivery order and gate pass (Tr. 507, 1435-1436). The driver went back to the customs inspector and then to the delivery office where the tally was entered in the delivery book (Tr. 508, 1437). The delivery book was then signed for by a representative of the trucking company, usually the driver, who was then stamped out and drove off the pier, surrendering his gate pass on the way out (Tr. 508-509, 1440).

The Pier 11 tallies for April - September 1972 were introduced at trial and identified by the checkers who had signed them. The checkers testified that they had not made the altering notations. The corresponding delivery book pages, gate passes, and regiscope photographs were also introduced. The government was able to establish, either through testimony of coconspirators or through handwriting and ink analysis, the identity of some of those who altered the tallies and many of those who signed for the tallies in the delivery book. Tallies where defendants were identified as the alterers were admitted into evidence. Tallies in which the alterers were not identified were also admitted, but only to show quantity (Tr. 4508-4513).

2. March - July 1972. In March or April 1972 Lester had a conversation with Pacilio in the Frigid yard (Tr. 2872, 2876-2877). As a result of that conversation Lester slacked a case,

sold it, returned to Frigid and gave $30, or half of his profits to Pacilio (Tr. 2878-2879). Pacilio took the money, stating "Next time, if you get anything, give it to Frankie [Questel] or Carmine [Piccora] because I can get a better price for it" (Tr. 2281, 2892-2894, 2917). A number of times in April or May Lester would slack cases for Pacilio and bring them to Piccora and Questel. Piccora and Questel would tell Lester to put the cartons in the freezer (Tr. 2889-2892).

One night about the end of April 1972 Pacilio and Bencivenga met defendant Smith and his brother, codefendant Alfred Smith, as the Smiths were pulling in their trucks at Frigid (Tr. 1787-1789). Pacilio had previously told Bencivenga that a lot of the Black drivers were stealing, and he wanted half of the profit (Tr. 1787-1788). Pacilio called the Smiths over and, in John Macchirole's presence, told them to show Bencivenga their altered tallies (Tr. 1789). Pacilio then told the Smiths that Bencivenga would be in charge of the stealing (Tr. 1789). Bencivenga, who received no wages but only a share of the profits from the seafood thefts, was instructed by John Macchirole to give the stolen merchandise to Pacilio (Tr. 1789-1851).

A week later, Pacilio introduced Bencivenga to the drivers at Frigid (Tr. 1790). Pacilio told the drivers that they would get half of anything they stole (Tr. 1790), and told Piccora that anything Bencivenga got would be put in the freezer for Pacilio (Tr. 1790-1791).

In March 1972 Valentine stole and resold 27 cases of lobster tails (Tr. 3282-3284). During the time Valentine was removing the cases Grasso drove up in his car and helped him carry the cases to the buyer, one Al Wade, one of Pacilio's best customers for stolen seafood (Tr. 3282-3287, 3310). Grasso and Valentine put 27 cases on Wade's truck and Grasso put another 10 cases in his car; Grasso paid Valentine $100 for the 10 cases (Tr. 3285-3286). When Valentine returned to Frigid that night, he discovered Grasso had reported Valentine's thievery to John Macchirole, then president of Frigid and son of Pasquale Macchirole (Tr. 3281-3282, 3286-3287). Later, John Macchirole ran into Valentine at a bar, threatened him and warned him to come up with $900 of his $1800 profit (Tr. 3287-3306).

On July 6, 1972, Bencivenga, at Pacilio's instruction, went to Pier 19 with Alfred Smith (Tr. 1865-1867, 1870-1873). Bencivenga went with two trailers, and by the time they were loaded, Pacilio arrived at the pier (Tr. 1867). Bencivenga handed Pacilio his tallies; Pacilio altered Bencivenga's tallies on the first load while Bencivenga altered his own on the second (Tr. 1867). Pacilio then signed out for the load in the presence of Bencivenga and one Anthony Spadafora, the delivery clerk at Pier 19 (Tr. 1874). After Bencivenga left Pier 19, he returned to Frigid (Tr. 1878-1879). The following day he made up his

slack from the contents on the trailer, so that his order would agree with the altered tally, and put the resulting cartons aside (Tr. 1879).

In early July 1972 Pacilio and Bencivenga discovered that Greene had stolen four cases but had not brought the stolen cases to Frigid (Tr. 1879-1880). Pacilio told John Macchirole and Macchirole asked Greene about it; Greene at first denied it, but, after Macchirole hit him, he admitted selling the cases in Jersey City (Tr. 1880-1881). Bencivenga took Greene to the buyer restaurant in Jersey City; the buyer told Bencivenga that he had paid Greene $80 a case for the four cases (Tr. 1881). Subsequently Pacilio told Greene that he would either pay $160 or give Bencivenga and Pacilio two cases back (Tr. 1882). Greene made good the next time he had "swag",or stolen, merchandise (Tr. 1882).

On July 19, 1972, Pacilio hired codefendant Dawson to drive a truck for him (Tr. 24, 26).[6/] Pacilio gave Dawson tally sheets and told him that slack cases had already been made up (Tr. 24-26, 34-35). When Dawson unloaded the truck he also noted that the slack had been made up (Tr. 25). Pacilio made it clear to Dawson that Bencivenga and Coughlin were his (Pacilio's) assistants and that Dawson should obey them (Tr. 30-34). Between July and

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6/ All citations to Philip Dawson's testimony herein refer either to the transcript of May 15, 1972 (afternoon session), paginated 1-63, or to the main transcript beginning with page 146.

and September 1972 Dawson stole shellfish from Pier 11 and other piers 15 or 20 times by loading Pacilio's truck (Tr. 199-202).

On July 25, 1972, Bencivenga, Alfred Smith and Coughlin unloaded frozen seafood at Pier 11. Certain tallies for that day (G. Ex. 31, 33, 35, 37, 39, 41, 43, 45) were subsequently altered (Tr. 934, 936-939, 978-981, 1139-1140). Most were altered by Bencivenga (Tr. 937-940, 1195, 4246). However, one tally (G. Ex. 33), according to document examiner Drew Somerford, was altered by Coughlin (Tr. 4256, 4308-4309, 4421). Somerford also concluded that Coughlin signed the corresponding delivery book pages G. Ex. 34, 38 and 46 (Tr. 4289). It was stipulated that corresponding delivery book page G. Ex. 44 was signed by Grasso (G. Ex. 44; Tr. 4350-4352, 4356). The corresponding regiscope photographs also showed photographs of the same persons identified as having signed the delivery books (see G. Ex. 170-203).

After altering their tallies, Bencivenga, Alfred Smith and Coughlin returned to Frigid to make up the slack (Tr. 1883). Fred Smith, who had been instructed to buy boxes that morning, met them with some Colgate Palmolive boxes (Tr. 1883, 1932). That night Bencivenga, Coughlin, the Smiths and Lofton made up the slack in a trailer near Frigid. They did this so that the cartons received from Pier 11 would agree with the altered tallies; the resulting surplus of shrimp could then be sold (Tr. 1883-1887).

During the summer of 1972 Jasper Lester, a truck driver,

slacked two cases of shrimp at Pier A or B in Hoboken and brought them to Frigid, where Lester told Piccora he had two cases for Pacilio (Tr. 2897-2898). Piccora said, "O.K., put them in the freezer" (Tr. 2898). That Friday Pacilio paid Lester $100 for the two slacked cases (Tr. 2898-2899). Later that summer, Lester slacked 4 cases of shrimp and repacked the stolen shrimp in whiskey boxes (Tr. 2905). He then drove to Frigid and told Piccora he had four cases for Pacilio; Piccora told Lester to put them in the freezer (Tr. 2905-2907). The following afternoon Pacilio gave Lester $100 for the stolen shrimp, saying, "Next time don'e [sic] use no whiskey boxes, ask Carmine or Frankie for boxes" (Tr. 2907).

3. August 1972. A number of tallies prepared on August 23, 1972, by Pier 11 checkers were subsequently altered (Tr. 990-992, 1197, 1210-1219, 1278-1289, 2769-2770). Alterations on four of these tallies (G. Ex. 117, 132, 134 and 136) were, according to document examiner Somerford, made by Coughlin (Tr. 4256-4257, 4309-4311, 4421-4422).[7/] Ink examiner Cantu additionally determined that these alterations were written in the same ink formation (Tr. 4456-4459, 4462-4463). Somerford also concluded that Coughlin had signed delivery book pages G. Ex. 133, 135 and 137 (Tr. 4289-

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7/ As a result of an examination of G. Ex. 29-169 in seven minutes on June 12, 1974, Bencivenga identified tallies G. Ex. 132, and 134 as tallies altered by him (Tr. 1993-1995). When Somerford was told of this prior identification, he concluded Bencivenga had been mistaken (Tr. 4421).

4290), corresponding to tallies G. Ex. 132, 134 and 136, and gate pass G. Ex. 234.

At the beginning of August 1972 Dawson loaded his truck at Pier 11 and Bencivenga wrote in the slack. Then Bencivenga, Pacilio and Piccora met Dawson back at Frigid; Bencivenga told Dawson to back his trailer up to Pacilio's and the men passed the cases into Pacilio's trailer (Tr. 27-28, 35-39). Once the cases were in Pacilio's trailer they were broken open and shellfish was taken out of the cases so that the cases would match up with the altered tally (Tr. 39-40). Subsequently Pacilio paid Dawson $400 or $500 for the slack cases (Tr. 41).

About two weeks later, Dawson again went to Pier 11, picked up shrimp and altered his tally (Tr. 41-42, 45). When Dawson returned to Frigid, Coughlin and Greene were slacking cases on Greene's trailer (Tr. 46-48). After Greene's trailer was finished, Dawson backed his up to Pacilio's and began slacking (Tr. 48, 52). Dawson was assisted by Pacilio, Coughlin, Fred Smith and others (Tr. 49). Later Pacilio paid Dawson $400 for the night's work (Tr. 55, 59, 202).

Near the beginning of August 1972, Pacilio told Bencivenga "that the old man went crazy, that we have to take all the frozen shrimp that we had in the freezer . . . and put it in another place besides Frigid's freezer" (Tr. 1937). Pacilio stated that they would use Pacilio's trailer to keep the shrimp cold and

gave Bencivenga a key to the trailer (Tr. 1937-1938). The following day Bencivenga saw 200 or 250 cases of shrimp sorted out by markings and sizes (Tr. 1938). In their prior conversation Pacilio stated that the freezer contained "all the stolen stuff that we stored from the course of the summer" (Tr. 1939).

On one occasion during August 1972 Lofton worked for Grasso, loading Grasso's truck at Pier 11 (Tr. 2460). Grasso told Lofton to load the truck normally, without any slacks (Tr. 2460). After they finished loading and got the tallies from the checker, Grasso drove halfway between the delivery office and loading office where he changed the notations on the tally (Tr. 2461).

In late August 1972 Lofton worked for Fred Smith as a loader at the 39th Street Pier (Tr. 2454-2455). While Lofton was loading it began to rain and the cardboard boxes fell apart (Tr. 2455). While the checker went to get more boxes, Lofton stole 20 cases and loaded them on the truck (Tr. 2455). He told Fred Smith what he had done and Smith in turn reported the theft to Pacilio (Tr. 2456-2457). Pacilio told Smith to back the truck onto the platform; Lofton then unloaded the 20 cases (Tr. 2456-2457). A few days later Pacilio paid Smith $500 for the cases; he split the money with Lofton (Tr. 2457-2459).

On August 29, 1972, Lester, at Pacilio's instruction, left his tally with Bencivenga; when Lester returned 10 or 15 minutes later, about 25 cases of slacks had been written in on it

(Tr. 2913, 2919-2921; G. Ex. 312, 313, 314). Lester, Fred Smith and Bencivenga then unloaded Lester's trailer, opening intact cases so that the order would agree with the unauthorized notations written in on the tally (Tr. 2913-2916). Pacilio paid Lester $100 three days later for his efforts (Tr. 2914, 2917-2918, 2930).

4. September 1972. On September 12, 1972, frozen seafood was unloaded at Pier 11 and altering notations were subsequently entered on the checked tallies (Tr. 890-910, 931-932, 1066-1071, 1124-1127, 1221-1224, 1228-1231, 1306-1311). The alterations on many of the tallies were, according to document examiner Somerford, made by Coughlin (Tr. 4256, 4311-4313, 4421; G. Ex. 142, 145, 147, 151, 159).[8/]

On September 22, 1972, as frozen seafood was being unloaded from the ship Clifford Maersk, Bencivenga went to Pier 11 (Tr. 1945). Coughlin and Conte had both driven trucks to the pier (Tr. 1945). Bencivenga saw Coughlin and asked him if he had any good lots coming off the ship yet (Tr. 1945). After Coughlin replied that 2 such lots were being unloaded, Bencivenga instructed him to place one on Conte's truck and one on his own (Tr. 1945). Since it was a Friday, Bencivenga told Coughlin to call him at Frigid and he would send someone to Merchants Refrigerating Company to

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8/ Bencivenga previously identified tallies G. Ex. 145, 147, 151 and 159 as tallies altered by him (Tr. 1993-1995)., see p.15 n.7 , supra.

help them make up the slack cases without the necessity of going back to Frigid (Tr. 1945).

According to Somerford, Coughlin then altered two previously checked tallies (G. Ex. 163, 165; Tr. 1233, 1243, 1322-1326, 4256, 4315-4317, 4421). Furthermore, Ruggiero testified he remembered Coughlin signing the corresponding delivery book pages and that the alterations on the tallies were in different handwriting from that of the checkers (G. Ex. 164, 166; Tr. 1460-1461, 1480).

When Coughlin left Pier 11 he telephoned Bencivenga as instructed (Tr. 1945-1946). Bencivenga told him that Greene would meet them with boxes at Merchants so they could make up the slacks (Tr. 1946). At 6:00 p.m. or 7:00 p.m. Coughlin again called Bencivenga, and told him that everything had been unloaded except 2 lots that "we wanted to hit and make up the slacks, and that all the supervisors were watching" (Tr. 1946-1947). Bencivenga told Coughlin to bring the shrimp "back to Frigid and freeze it over the weekend because we don't want no claims against us" and Coughlin did as he was instructed (Tr. 1946). 9/

9/ On September 26, 1972, Victor Jurusz, security director for the Brigantine Terminal Corporation, responsible for running Pier 11, questioned Ruggiero concerning the September 22, 1972, shipment picked up by Frigid (Tr. 495, 497, 513-518). Subsequently, Jurusz examined the relevant tallies (Tr. 518-520). He then spoke to the checkers and thereafter went to Merchants Refrigerating Company, spoke to the warehouse superintendent and examined the cargo (Tr. 522-529, 821-826; G. Ex. 247-252), beginning the investigation into the scheme in which defendants were involved. The thefts, however, continued. As late as March 1973, Greene told Valentine he had made $15,000 off the piers in 3 months (Tr. 3356).

IV. Valuation and Foreign Commerce

The value of the stolen merchandise was shown by cost and sales invoices of the consignees of the shrimp shipments, computing the value at the lowest price per pound. The foreign commerce nature of the shipments in question was shown through relevant bills of lading, see 18 U.S.C. 659 (G. Ex. 349-436).

V. The Defense Case

The defendants did not testify in their own behalf. They presented representatives of two seafood importers who testified that despite the problem with slacks they continued to use Frigid as their trucker (Tr. 4659-4674). Peter Palmisano, a former truck driver for Frigid, denied ever being involved in stealing (Tr. 4753-4754).[10/]

10/ See also the stipulation entered into regarding the testimony of Al Wade n. 18, p. 28-29 infra.

ARGUMENT

I

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANTS' CONSPIRACY CONVICTIONS (B. I 1-6, 16-19; B. II 9-13). 11/

The evidence showed that in 1964 or 1965 drivers at Frigid were instructed by Pasquale Macchirole to split their profits from stolen seafood with Macchirole. From that time forward Pacilio collected the merchandise and/or money while Grasso participated in the theivery. Piccora unloaded trailers containing the stolen merchandise and placed it in the Frigid freezer. As early as 1968, Fred Smith became involved in the conspiracy; and in 1970 defendant Greene joined the scheme. In 1972 the conspirators changed their mode of operation. Instead of paying off the checkers or simply stealing cases directly from the piers, the participants customarily altered tallies in loading their trucks and slacked the orders later to reflect the altered tallies, splitting the resulting surplus of seafood and/or cash profit with Frigid. It was during 1972 that defendant Coughlin joined the conspiracy as one of Pacilio's assistants. In sum, evidence of a conspiracy to steal seafood was overwhelming; equally overwhelming was the evidence connecting all six defendants with that conspiracy.

11/ The brief of defendants Green, Grasso and Smith will be cited "B. I"; that of Pacilio and Piccora as "B. II"; and that of Coughlin as "B. III". "App." refers to the appendix attached to B.I.

The conspiracy having been established, notwithstanding the hearsay rule, statements of one coconspirator were admissible in evidence against all coconspirators. Anderson v. United States, 417 U.S. 211, 218-219; Dutton v. Evans, 400 U.S. 74, 80-81; United States v. Ruggiero, 472 F.2d 599, 607 (2nd Cir. 1973), cert. den., 412 U.S. 939; United States v. Zane, 495 F.2d 683, 696-697 (2nd Cir. 1974).[12/] Moreover, contrary to defendants' contentions that instances of wrongdoing as to most of the participants only occurred subsequent to 1972(B. II 9-13), the evidence, as detailed supra, p. 4-8, clearly shows such instances as to all defendants save Coughlin prior to 1972.

Defendants' contention (B.I. 1-6) that the government failed to prove defendants' actual knowledge that the stolen goods were taken from interstate commerce is refuted by the facts, which show ample evidence, through bills of lading demonstrating the foreign nature of the goods and by description of the customs procedure at Pier 11, from which a reasonable

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12/ Fred Smith cannot therefore complain that evidence concerning the participation in the conspiracy of his brother Alfred Smith was improperly admitted into evidence (B.I. 19-19a). Even if such testimony may have been prejudicial to Fred Smith, it was properly admitted into evidence under the coconspirator exception to the hearsay rule. See United States v. Ruggiero, supra.

The court found sufficient evidence of a conspiracy and Pacilio's and Fred Smith's participation therein at the close of Bencivenga's testimony (Tr. 1840); at the close of all the evidence the court found sufficient evidence on the conspiracy count as to all defendants to warrant jury consideration (Tr. 4561-4572, 4624-4652); and the court thoroughly and correctly instructed the jury on the statements of coconspirators (Tr. 4955).

jury could infer defendants' guilty knowledge. See United States v. Houle, 490 F.2d 167, 170 (2nd Cir. 1973); United States v. Marquez, 424 F.2d 236, 239 (2nd Cir. 1973), cert. den., 400 U.S. 828.

In any event, even though the court charged that knowledge of the interstate character of the goods was an essential component of the conspiracy (Tr. 4945-4946), proof of such knowledge is unnecessary in view of United States v. Feola, ___ U.S. ___, No. 73-1123 (decided March 19, 1975) where the Supreme Court held:

> ... that where knowledge of the facts giving rise to federal jurisdiction is not necessary for conviction of a substantive offense embodying a mens rea requirement, such knowledge is equally irrelevant to questions of responsibility for conspiracy to commit that offense. (Slip op. at 24)13/

II

THE PROSECUTOR'S CONDUCT, EXAMINATION OF WITNESSES AND CLOSING ARGUMENT WERE PROPER [B.I., 23-32].

Defendants' allegations of prosecutorial misconduct are considered below and rejected seriatim. Before doing so, however, we respectfully advise this Court that Judge Costantino, in presiding at defendants' trial, in no way exhibited personal bias towards the defendants; to the contrary, Judge Costantino's remarks and evidentiary rulings exhibited, in our opinion, a thorough dislike of the United States Department of Justice

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13/ For a substantive violation of 18 U.S.C. 659 to stand, it is unnecessary for the government to prove scienter. See United States v. Houle, supra; United States v. Tyers, 487 U.S. 971.

Strike Force in general and of Prosecutor Ritchie in particular.[14/] It is in this context that defendants' allegations of prosecutorial misconduct should be evaluated.

1. The defense objected to the introduction of one of the gate passes and corresponding tallies on the grounds that the name on the gate pass was indistinct (Tr. 1190-1198). The government argued that the regiscope photo would identify the signer of the gate pass (Tr. 1198). Defense attorney Verdiramo then stated: "I object to him [Ritchie] testifying unless he knows who it is", to which Ritchie replied, "I know who it is" (Tr. 1198; B.I. T-37). After protests by the defense and a request for a mistrial, the jurors were excused, and the prosecutor was admonished (Tr. 1198-1201). The prosecutor explained that he was merely making a proffer that the corresponding regiscope photo was that of Fred Smith (Tr. 1201-1202). Subsequently the jury was instructed (Tr. 1209):

> ... that anything that the United States Attorney says that he knows has nothing to do with this case.
>
> I advise you that any information you get in this case comes from the witness stand and documentary proof in the case.

In light of the fact that the prosecutor's statement was induced by Verdiramo's statement, the statement was adequately cured by the judge's instruction, and defendants' guilt was overwhelming,

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14/ See, e.g., Tr. 3072-3077a ("strike force lawyers"); Tr. 896-910, 1004-1005, 1468-1472, 1693-1694, 3072-3075, 3196-3197 (refusal to admit evidence, subject to connection, regarding severed coconspirators); Tr. 1145-1152 (tallies); Tr. 3097-3106 [footnote continued on next page]

the prosecutor's statement was not such as to require a mistrial.[15/] See Sears v. United States, 490 F.2d 150, 153-154 (5th Cir. 1974); United States v. Bivona, 487 F.2d 443, 445 (2nd Cir. 1973).

2. The prosecutor's attempt to get into evidence the fact that a pen was normally used by Bencivenga to alter the tallies, as well as the carbon paper previously selected by the checker, was nothing more than an example of vigorous and permissible prosecution in an attempt to elicit testimony which would have been relevant to the case.[16/] See generally, United States v. White, 486 F.2d 204, 206-207 (2nd Cir. 1973); United States v. Sawyer, 443 F.2d 712, 713 (D.C. Cir. 1971).

3. The prosecutor properly questioned Bencivenga concerning his activities with Al Wade, one of Pacilio's best customers for stolen seafood (see B.I. 31; App. T54). It had been established that Bencivenga had sold shrimp to Wade in August 1972 (Tr. 2039-2040). Since only Wade, an unindicted coconspirator, and Bencivenga were present, the judge, even though he recognized that a coconspirator was involved, refused to allow further questioning (Tr. 2042). In these circumstances the prosecutor's attempt to get into evidence relevant actions

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(subpoenas for Frigid's bills of lading); Tr. 3439-3441 (tape recording); Tr. 3419-3421, 4488 (criticism of prosecutor).

15/ Defendants' further allegation that the prosecutor was screaming during this colloquy (B.I. 27) is not borne out by the record. Rather, the court advised defense counsel Verdiramo "you are talking too loud" (Tr. 1198; App. T37).

16/ The checkers were required to use ink in making out the tallies.

of a coconspirator was clearly proper and the defense motion for a mistrial was properly denied (Tr. 2050).

4. During cross-examination of government witness Lofton attorney Verdiramo tried to establish a discrepancy between Lofton's grand jury testimony and his testimony at trial.[17/] The following colloquy occurred (Tr. 2487):

> Q. When you went before that Grand Jury, isn't it a fact that you told them everything that you thought was important?
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> A. At that time I was kind of skeptical about answering questions because I was afraid for my safety, so I answered the questions as best as I could without putting too many names in.

The remark was not, as defendants contend, gratuitous, and when the prosecutor asked on redirect (B I App. T41; Tr. 2657): "Now when you went into the Grand Jury, who or what were you afraid of?" he was properly exploring an area opened up on cross-examination. See United States v. Press, 336 F.2d 1003, 1013 (2nd Cir. 1964), cert. den., 379 U.S. 965, and sub nom. Fry v. United States, 379 U.S. 973; United States v. Davis, 262 F.2d 871, 876 (7th Cir. 1959). In any event the judge did not allow the witness to answer, although he admitted that there was a foundation for such a question (Tr. 2658-2668). When the prosecutor asked Lofton a leading question on redirect (Tr. 2652) (see B.I. 32), the court also told Lofton not to respond, and the prosecutor moved immediately to a new area (Tr. 2652-2653). Thus, the effect, if any was harmless.

17/ At one point he called Lofton an "absolute liar" in front of the jury; the remark was struck (Tr. 2527-2528).

5. On cross-examination of Ralph Scheffler, a claims agent for some of the consignees, defense counsel asked Scheffler whether he knew of the procedure when an order was short (Tr. 3128) (see B.I. 30). Defense counsel Verdiramo then indicated that he was making Scheffler his witness (Tr. 3128). Ritchie objected to the testimony as hearsay when Verdiramo asked the following question (Tr. 3128-3129): "Did Mr. [Anthony] Spadafora [the delivery clerk on Pier 19] and you ever have a conversation wherein Mr. Spadafora told you that he was under instructions to make up new cartons, slacking, of other cartons to make up new cartons so that he could come up with the correct carton count as indicated on the bill of lading?" The judge allowed Scheffler to answer (Tr. 3129-3130). Ritchie continued to object stating that Spadafora was a codefendant (Tr. 3130). The judge then stated: "I didn't accept it as an admission. It is a statement made to him to have more facts before the jury" (Tr. 3130). After the judge made the statement limiting the testimony, the prosecutor remained silent. In these circumstances there was no error.

6. Defendants also contend that the prosecutor attempted to prevent exculpatory testimony concerning Al Wade, a buyer of stolen seafood from Pacilio, from coming into evidence (B.I. 30). The facts concerning Wade and the incident in question are as follows.

Valentine testified that in March 1972 John Macchirole found out about cases of lobster tails Valentine and Grasso had

stolen and sold directly. Macchirole warned Valentine not to try a direct sale again without a cut for Frigid; and he gave Valentine one day to come up with $900, half of the proceeds from the sale (Tr. 3287-3293).

The next day, according to Valentine, he met Wade. While Valentine and Wade were talking, Pacilio and the Macchiroles arrived (Tr. 3298). Pasquale Macchirole told Wade, "I said I told you about buying stuff off the truck" (Tr. 3298). Subsequently Wade placed three $100 bills on the bar (Tr. 3299-3301). Pasquale Macchirole picked up the bills (Tr. 3301) and told Wade that he still owed $600 (Tr. 3304-3306).

In a pretrial interview by the government Wade stated that he did not recall the March 1972 incident; he did, however, inculpate some of the defendants. Wade did not testify as a government witness, but his statement was proffered to defense counsel at the close of the government's case-in-chief. The statement was not exculpatory; nor did the prosecutor attempt to conceal it from the defense.[18/]

18/ Wade was interviewed by the government to see if it would be useful for the government to seek immunity in exchange for his testimony (Tr. 4473-4474). Since Wade stated he had no recollection of the March 1972 incident, and because the prosecutor thought he was lying, Wade was not called as a government witness (Tr. 4473-4474). In his statement Wade also made inculpatory statements with respect to some of the defendants (Tr. 4479). When Wade's statement was turned over to the defense at the close of the prosecution's case, defense counsel made no attempt to subpoena Wade at that time (Tr. 4473-4474, 4482-4485).

On July 22, 1974, Ritchie represented to the court that he had contacted Wade's attorney, Philip Blomberg, who stated [footnote continued on next page]

7. Defendants contend that the prosecution's volunteering of one "Whitey Freddie's" last name - Agnello - during his direct examination of Valentine was error (B. I 28, App. T39-40; Tr. 3336-3337). Valentine had previously testified that "Whitey Freddie" was a runner on Pier 11 (Tr. 3334). Defense attorney Verdiramo objected that "Whitey Freddie" was not sufficiently identified (Tr. 3335). Subsequently, the prosecutor used "Whitey Freddie's" last name in a question (Tr. 3336). The judge immediately admonished the prosecutor and no further questions about "Whitey Freddie" were allowed

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that he could get his client in court by 11:30 a.m., July 23, 1974, despite the fact that Wade had never been served with a subpoena (Tr. 4782, 4788). The court had previously promised to get the case to the jury by July 23, 1973, since two of the jurors had vacation plans due to commence on July 24, 1974 (see pages 40-51, infra). The defense, professing their desire to speed up the proceedings so that the judge could meet his promised deadline, suggested that Ritchie stipulate to Wade's exculpatory testimony (Tr. 4755-4756). At first Ritchie refused, stating that if the defense called Wade the government had a right to cross-examine him (Tr. 4757-4760). Ritchie noted that the defense had had three days to subpoena Wade and had not done so (Tr. 4787). The defense then suggested that since Ritchie refused to stipulate Ritchie should be forced to take the stand (Tr. 4788). The court agreed, stating it would not sustain a government objection to Ritchie's testimony as incompetent (Tr. 4789-4791). Under threat of being called as a witness the following stipulation was entered into and read to the jury (Tr. 4792-4793):

> David Ritchie, if called, would testify that he interviewed Mr. Al Wade and that Mr. Al Wade said to Mr. Ritchie that he had no recollection of a meeting in the Boondock Bar at which Mr. Pasquale Macchirole, John Macchirole and Neil Pacilio were present, without conceding the truthfulness of the statement of Mr. Wade.

The court refused to allow the government to add any inculpatory material to the stipulation, stating "If you want him for the others you should have brought him in" (Tr. 4792).

(T. 3337-3338). In these circumstances, the error, if any, was rectified.

8. Defendants cite the judge's threat to hold prosecutor Ritchie in contempt (B. I 31, T56; Tr. 4251) as an example of a consistent course of prosecutorial misconduct. An examination of the record shows otherwise. The threat occurred when Ritchie attempted to have Somerford identify alterations on tallies as having been made by Bencivenga, confirming Bencivenga's earlier testimony. In these circumstances the judge's threat was clearly unwarranted, since the testimony, had it been elicited, would have been proper. See, United States v. King, 415 F.2d 737, 739 (6th Cir. 1969), cert. den., 396 U.S. 974; Wood v. United States, 357 F.2d 425, 427-428 (10th Cir. 1966), cert. den. 385 U.S. 866.

9. Defendants contend that the prosecutor made a conscious effort to use his youth as a means of obtaining sympathy from the jury (B. I 28-29, App. T43-45). An examination of the record shows that just prior to Ritchie's statement on Tr. 4294, "I am a young lawyer trying my best", defense counsel Verdiramo had asked, "Can the Government get a dismissal for incompetent counsel", thereby provoking Ritchie's remark. The defense remark was stricken and the prosecutor was admonished (Tr. 4236, 4330). United States v. Guglielmini, 384 F.2d 602, 604-605 (2nd Cir. 1967), upon which appellants rely, is inapplicable. There,

the court made a series of remarks designed to cast an unfavorable light on the defense and justified the prosecutor's behavior on on the basis of his youth. The court's course of conduct here, if anything, cast an unfavorable light on the prosecutor. In these circumstances the defense was not prejudiced. See generally, United States v. Sclafani, 487 F.2d 245, 256 (2nd Cir. 1973); United States v. Rinaldi, 393 F.2d 97, 99 (2nd Cir. 1968), cert. den. 393 U.S. 913.

10. An examination of the facts shows that defendants contention that the prosecutor's summation was riddled with errors is also without merit (B. I 23-26; T18-36). All summations took place on July 22, 1974; the prosecutor spoke from about 10:00 p.m. to 11:15 p.m. During that summation he was constantly interrupted by objections from the defendants.

a. The first defense objection was made when the prosecutor used the altered tally sheets to establish the dates of the thefts (Tr. 4885). The transcript at 4525-4536 shows, contrary to defendants' allegation (Tr. 4887), that all the altered tallies were admitted in evidence in their entirety (Tr. 4530-4531), while those tallies on which the alterations were not admitted were admitted only to show quantity (Tr. 4527-4530). The judge stated that he would read to the jurors from the latter tallies if they so desired (Tr. 4530-4531). He refused to allow the prosecutor to comment on the alterations on the

tallies during summation, but agreed to allow references to the checkers' testimony. At the time defendants objected the prosecutor had made no such forbidden comment. The judge then stated, "There is no proof as to who altered the tallies and who got them" (Tr. 4887). Ritchie then asked the judge, whose previous rulings were at best unclear, on what he could comment, and the judge stated he could only comment about the tallies regarding quantity (Tr. 4889). When Ritchie properly argued that "With respect to the tallies that are not fully in evidence, if you wish you can hear the checkers testify as to what was actually delivered and you can compare it with what was on the delivery page", the judge, on defense objection, barred the argument that any inferences could be drawn therefrom (Tr. 4889).

b. Subsequently, when Ritchie attempted to argue inferences from Grasso's signature on the delivery book pages and from the checkers' testimony the court stated "The tally is not in evidence" and "There is no way of their looking because the tally itself is not in evidence" (Tr. 4900-4902), despite his prior ruling that the tallies could be commented on as to quantity. When Ritchie continued to argue inferences from the checkers, the court, after defense attorney Verdiramo's statement "I will stand on my feet and keep objecting", ordered Ritchie to change the subject, although Ritchie had not once mentioned the tallies (Tr. 4904-4905).

c. On direct examination Valentine testified that John Macchirole grabbed him by the neck at Andy's Bar, asking him about the theft of lobster tails, see pages 27-29 supra (Tr. 3287-3288, 3290-3292). Defendant Grasso interrupted and the following colloquy occurred:

> DEFENDANT GROSSO[sic]: I grabbed you by the collar.
>
> THE WITNESS: He grabbed me first.
>
> DEFENDANT GROSSO[sic]: I grabbed you in the collar.
>
> THE WITNESS: He grabbed me first, and then he grabbed you.
>
> DEFENDANT GROSSO [sic]: It's a lie.

Grasso then left the courtroom and the judge ordered defense counsel to bring him back (Tr. 3288-3289).

During his closing argument the prosecutor stated as follows (Tr. 4709):

> . . . you will recall that when John Valentine testified to that incident it struck a chord in Mr. Grasso's memory; Mr. Grasso, if you recall, made a statement at that time, he didn't dispute the meeting in Andy's Bar, he didn't dispute the $100, the only thing he disputed was whether John Macchirole throttled Johnny Valentine, and I submit that that is a very powerful corroboration of Johnny Valentine.

The defense immediately objected, accusing the prosecutor of commenting on Grasso's failure to testify, and asked for a mistrial (Tr. 4907). The prosecutor denied any such comment, and the statement, indeed, does not contain one (Tr. 4907). The court, however, admonished the prosecutor, instructing the

jury (Tr. 4907-4908):

> A defendant need not take the witness stand and no inference can be drawn, nor should the prosecutor state or try to make an inference from such a failure to do so.19/

When several pages later the prosecutor stated "Remember Albert Grasso? When Valentine testified . . . ", he was immediately subject to objections (Tr. 4925) and was again admonished by the court (Tr. 4925). In light of the judge's admonitions, the fact that the prosecutor never referred to Grasso's failure to testify, and that overwhelming evidence of Grasso's guilt, there was clearly no ground for a mistrial here. See United States v. McCarthy, 473 F.2d 300, 304-305 (2nd Cir. 1973); United States v. Cusumano, 429 F.2d 378, 381-382 (2nd Cir. 1970), cert. den. sub. nom. Testa v. United States and Riggio v. United States, 400 U.S. 830; Satz v. Mancusi, 414 F.2d 90, 92 (2nd Cir. 1969).

d. Several moments later when Ritchie argued that it could be inferred that Piccora was paid by Pacilio through Bencivenga, the court struck the argument, stating "it is not the real facts" (Tr. 4913-4914).20/ Ritchie immediately moved on to another

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19/ Defense counsel Verdiramo stated "Let the record show that Grasso said it is a lie, if nothing else, he said that, and that is in the record", and the court stated, "That is all" (Tr. 4907-4908).

20/ Bencivenga had testified that he paid Piccora 3 or 4 times, Fred Smith a number of times, Danduono once, and Conte every week (Tr. 2054-2061).

subject (Tr. 4914-4915).

e. Defendants allege that Ritchie's statement during summation that Bencivenga quit Frigid in 1968 because he refused to split the proceeds of his thefts with Frigid was a conscious misstatement. Viewed in context, the statement was made after Bencivenga was asked if he was fired in 1968 because he stole (Tr. 2091-2092). He replied (Tr. 2092; I T30):

> No, I got fired because I didn't deliver a load. I didn't want to kick in 50 percent to nobody. I wanted to get fired because I didn't want to share 50 percent with anybody.

The only time Bencivenga was fired for stealing was in 1964 (Tr. 2092; B. I T30).

f. Immediately afterward when Ritchie attempted to argue inferences from testimony regarding John Macchirole, he was stopped and went on to another subject (Tr. 4916-4917). Since John Macchirole was acquitted, prejudice would hardly accrue to the other defendants from this argument.

g. As the defendants themselves admit (B. I 26), the prosrcutor corrected himself immediately after he misspoke, referring to "the background of the defendants" instead of "witnesses" during summation (B. I T36; Tr. 4924).It is to be noted that the statement occurred at 11:00 p.m. after a long day of trial (Tr. 4924).

When the government's attempt to draw inferences from the character of its witnesses to the nature of all those hired by

Frigid was halted by defendants' objections, the prosecutor abandoned that course of inquiry (I T.34; Tr. 4926-4927). Ritchie's subsequent comment on testimony the defense attempted to elicit from Lofton on cross-examination was proper, and a defense objection was properly denied (I T. 35; Tr. 4930).[21]

III

VARIOUS RULINGS OF THE COURT WERE CORRECT. (B. I 7-9, 16-19; B III 3-5)

1. Defendants contend that the government's handwriting expert was unqualified and therefore his testimony should not have been permitted. Drew Somerford, employed as an A.T.F. examiner of questioned documents for the United States Treasury Department, had been qualified for fourteen months as an expert and had previously testified in six other cases (Tr. 4173, 4182, 4203-4204). He completed an A.T.F. study program and a three-year apprenticeship (Tr. 4174-4177); he had also attended courses at the Secret Service Questioned Document School and

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21/ The defendants also allege prosecutorial misconduct on various other occasions. An examination of the complete transcript in the cited instances reveals that the prosecutor's actions, in the context in which they occurred, were perfectly proper. (e.g., with respect to the direct examination of witness Valentine at Tr. 3305, see Tr. 3304-3310; with respect to the direct examination of Bencivenga at Tr. 1952-1953, see Tr. 1769-1772 and 1952-1956).

We note additionally appellants have no standing to complain about the grand jury presentation (B. I 40-41), Costello v. United States, 350 U.S. 359, 364 (1956); moreover, there is nothing to suggest that it was improper (see, G. Ex. 3500-3, 3500-4).

and the Georgetown University Forensic Science Laboratory, and had completed course requirements for a M.A. in Police Administration at American University (Tr. 4177-4181). In these circumstances the receipt of his testimony was proper and relevant. See generally United States v. King, supra, 415 F.2d at 739.

2. During cross-examination of witness Bencivenga, he was asked if he ever consulted a psychiatrist named Davis (Tr. 2125). The government objected on the grounds of relevancy (Tr. 2125). The defense proffered that the testimony would show that Bencivenga had been treated extensively and that psychiatric testimony would impeach his credibility (Tr. 2125). The court stated that Bencivenga could refuse to answer on the ground of privilege (Tr. 2125-2127). Out of the presence of the jury Bencivenga stated that he "went to an analyst once" (Tr. 2128). The court then instructed him that he could refuse to testify on the ground of physician-patient privilege (Tr. 2128). Bencivenga invoked the privilege and the questioning was halted (Tr. 2129).

The following day the defense again raised the question, and the court reserved ruling until the following Monday (Tr. 2168-2171, 2178). On Monday morning the court again barred the testimony on the ground that it was privileged and beyond the scope

of the direct (Tr. 2186-2188).[22] The following colloquy occurred (Tr. 2190):

> MR. RITCHIE: . . . while a privilege might cover what conversation went on during the meeting [with the psychiatrist], it wouldn't cover the fact that there was in fact a meeting.
>
> MR. VERDIRAMO: The Government is advocating the use of that information for Mr. Bencivenga so much I wonder if we really want it?
>
> THE COURT: Do you fellows want it?
>
> MR. ROSEN: I don't want it, Judge. I think the jury knows he's crazy.
>
> MR. DEL ROSSO: I will take exception to the ruling of the Court.
>
> THE COURT: If he doesn't object you can ask the question. If Mr. Bencivenga still says he won't waive, that's the end of it.
>
> MR. ROSEN: I won't go into it because I have every reason to believe that the jury thinks he is a liar anyway.

This line of questioning was not further pursued by defense counsel.

While the court's ruling barring any inquiry may have been erroneous, see e.g. United States v. Benn, 476 F.2d 1127. 1131 (D.C. Cir. 1973), since defendants chose not to pursue this matter any further as suggested by the court, they may not now

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22/ At that time, the government stated that if Bencivenga were undergoing psychiatric care during the trial or during the time of the offenses about which he was testifying, such testimony would be relevant (Tr. 2188-2190).

complain.

3. On the afternoon of June 25, 1974,[23] defense counsel Verdiramo announced that he would be unable to be present on the following day since he had been subpoenaed to appear before a New Jersey grand jury in an unrelated case (B.I T8-T9). He indicated that defense counsel DeLuca and Margulies had agreed to represent his clients during his absence (B. I T9). Verdiramo requested that the case be continued if witness Lester were allowed to testify or "If it is too much of an imposition on the Court then do whatever you feel is right" (B. I T9-10). The Court subsequently asked defendants Greene, Fred Smith, Danduono, Conte and Grasso if they waived Verdiramo's presence; all five responded unqualifiedly in the affirmative (B. I T11-T12).

The following day Lester testified and the judge stated his intention to finish with the cross-examination of Lester on that day (Tr. 2995, 3011). As previously indicated Verdiramo did not appear and defendant Fred Smith, contrary to his earlier representation, indicated that he wanted Verdiramo present for the cross-examination of Lester (Tr. 3011-3012).

On the following day, Verdiramo did not subsequently request that the court re-open the cross-examination of Lester so that

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23/ The transcript of the proceedings on the afternoon of June 25, 1974, is separately paginated as United States v. Lester, 74 CR 445.

he could personally cross-examine Lester on behalf of his clients nor did he allege that Fred Smith's waiver was ineffective.[24/]

Since Fred Smith had waived Verdiramo's presence prior to Lester's cross-examination, was in fact represented by other defense counsel during Verdiramo's absence, and did not move to reopen Lester's cross-examination after Verdiramo's return, he may not complain at this late date.

IV

THE COURT DID NOT COERCE A VERDICT
(B. I 10-15, 34-35; B. II 2-8, 15-17)

A. The Trial

1. After the jurors and alternates had been sworn but prior to the commencement of trial, the court at their request excused three jurors, and seated three alternates in their places (Tr. 3-7, 11).[25/] No other jurors were available that day (Tr. 4). The prosecutor and counsel for John Macchirole opposed commencing the trial with only 12 jurors, prosecutor

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24/ Although Verdiramo alleges (B. I 17) that he previously protested his absence, the record reveals only that he stated as follows (B. I 17; Tr. 3085):

> At this point I am wondering . . . but I don't know if my defendants are honestly and truly getting the benefit of counsel at this point. I don't think so. Many times I am asleep at the switch because I am trying to find out what sort of defense I am going to . . .

25/ All citations herein are to the transcript of the trial on the morning of May 15, 1974, paginated 1-82.

Ritchie stating (Tr. 7):

> With twelve jurors we are in a great deal of trouble. Mr. Rosen and I in speaking were speculating about the possibility of awaiting a new panel on Monday. I think it may end up saving the court a lot of time and saving the Government and defense the expense and trouble of a second trial after a mistrial. I think there is a substantial risk in a long case such as this of a mistrial.

Other defense counsel indicated that they would prefer to commence with twelve and the judge indicated that he was ready to commence trial, stating "If I want to proceed with twelve I can proceed with twelve. What difference does it make?" (Tr. 7-11). The trial then began.

2. On July 15, 1974, after the government had presented the bulk of its case, Juror No. 5 told Judge Costantino that she had plans to leave for Canada on July 19, but could delay a few days (Tr. 3952). The judge responded that the jury would get the case by Tuesday, July 23, 1974; prosecutor Ritchie indicated that would be agreeable to him (Tr. 3952-3953). The judge stated "That is my promise to you. If it's not, you are going to be leaving - Tuesday will be the last day you are here. You will be leaving on Wednesday, I make that promise to you" (Tr. 3953). Juror No. 11,who also had vacation plans,was given a similar response (Tr. 3954). At that time no defendants raised any objections.

On the following day Michael Rosen, counsel for acquitted

codefendant John Macchirole, told the court (Tr. 4110):

> . . . anticipating the close of the Government's case, motions, the defense case, summations and time for the deliberation, your Honor's assurance to the jury, unfortunately will not be met, and grave prejudice will seep into this trial to force a verdict or determination in such a short period of time.

No other defense counsel protested at that time. Defense counsel Rosen, expressed further concern regarding the jury situation and the following discussion ensued (Tr. 4112-4113):

> MR. ROSEN: . . . I say to your Honor most seriously, that the impression to be conveyed to the jury, is that come cold or hot water, there has got to be a verdict by Tuesday night.
>
> THE COURT: I didn't say that. I said they would have the case by Tuesday.
>
> MR. MARGULIES: They are taking off Wednesday.
>
> MR. ROSEN: Most respectfully, we assured -
>
> THE COURT: I can't help it if we go to Friday.
>
> MR. VERDIRAMO: I was at a phone booth yesterday, and I overheard a juror speaking to someone, because the doors are all open out there, saying that this is the last time I will ask you to change the plans, put everything on for Wednesday morning.

At no time did any of defense counsel suggest that the judge clarify to the jurors that he only promised that the case would be submitted to them by Tuesday July 23, 1974, and that they might find it necessary to deliberate beyond that date.

That afternoon, during a discussion concerning the length of the Government's case the court noted (Tr. 4144-4145):

All I know is when we lost the jury, we lose the jury. I am not going to say one word to the jury in stating that they must sit or anything else. Once they say "Judge, we sat long enough. We think that everyone's time has been wasted, that the case has not proceeded speedily." I'm going to tell them that I have each day, insisted that the case proceed on a certain course. It has not proceeded on that course. The jury will be instructed as to that, and when they say they are going on their vacations, I am going to salute them and send them on their vacations, and that is the end of it.

3. During argument on various motions on July 19, 1974, prior to the defense case, defense counsel Rosen again expressed his concern, stating "I understand that the Jury is not going to sit past Tuesday. They said they wouldn't sit past Tuesday" (Tr. 4655). The judge replied, "We will be in good shape don't worry about it" (Tr. 4655). Then the following discussion ensued, the defense never suggesting the jurors should be instructed that they would be required to deliberate as long as necessary (Tr. 4655-4656):

THE COURT: . . . If we have to work very late Tuesday we will do that, we will work late. We will give it to them and let them have the case.

I will not rush a verdict, guaranteed. Once they have the case --

MR. MARGULIES: As a practical matter, sir, if they get the case, even though they are not rushed by the Court or by counsel or by anyone else, their circumstances are such that they will be under this tremendous pressure.

THE COURT: There are two people who are rushed. You are still dealing with ten and the other ten are going to say "No way, we are not ready to make a decision." This has been my experience. It won't work that way.

MR. ROSEN: This is a rather friendly Jury, they look friendly to each other --

THE COURT: They are all friendly.

MR. ROSEN: To each other.

THE COURT: Don't worry about it.

MR. ROSEN: I am concerned that maybe the two that must leave could possibly pursuade the others to compromise a verdict or hurry up their deliberation.

4. Subsequently, during the July 22, 1974, debate over the Al Wade stipulation, see n.18, p. 28-29, supra, the government, through Department of Justice Attorney Gerard McGuire, suggested that the court hold the jurors until the following day; the court with the approval of defense counsel, refused to do so (Tr. 4774-4775). Defense attorney Rosen stated (Tr. 4788):

> The defense, in view of all the circumstances, is prepared to sum up tonight, have your Honor sum up tonight and let it go to the jury.
>
> We want a verdict here. We don't want to waste 12 weeks of effort we have put in. We feel any further delay now has to be prejudicial to the defense. I don't want them picking and choosing between counts.
>
> The danger of a compromise verdict is obvious.

The Wade stipulation was then forced upon the government and the case proceeded to argument.

B. The Charges And Jury Deliberations

On the morning of July 23, 1974, the court instructed the jury as follows (Tr. 4968-4970):

> You are here to determine the guilt or innocence of the defendants here charged from the evidence in the case. . . . [I]f any reasonable doubt remains in your minds after impartial consideration of all the evidence in the case, it is your duty to find the defendants not guilty.
>
> * * * *
>
> Now, in this type of case there must be a unanimous verdict, that means all twelve of you must agree, and it goes without saying, that it becomes incumbent upon you to listen to one another and to argue out the points among yourselves in order to determine in good conscience whether your fellow jurors' argument is one commensurate with yours or whether at least you can with good conscience agree with him. You have no right to stubbornly sit by and say, "I am not talking to anyone," "I am not going to discuss it," because people with common sense and the ability to reason must communicate, they must communicate their thoughts.

The jury received the case at 12:40 p.m. and deliberated until 9:50 p.m. that same day when the verdict was returned.

C. Post-Trial Proceedings

On November 15, 1974, defendants filed motions with the trial court for a judgment of acquittal or new trial accompanied by the affidavit of one of the jurors. The affidavit (G.I. A-3; B. II, 16) stated, in pertinent part:

[A]t approximately 7:30 p.m., I thought that further discussion was useless and on three separate occasions I told the jury foreman that the jury should report to Judge Costantino that the jury was a hung jury and hopelessly deadlocked.

At this point, juror twelve said that if we so informed the Judge that he could possibly order us back to deliberate for six more hours and may even order us to stay overnight. When jurors five and eleven heard this, they immediately protested to the other jurors. Jurors five and eleven again stated that they had to leave this evening as their planned vacations were to start the very next day. Juror twelve then remarked that he did not care if the jury's deliberations lasted another month as he had no plans.

Therefore, the fact that jurors five and eleven had to leave that evening; the firm stand of jurors two and twelve for conviction of all defendants; the fact that all jurors except myself were against informing the Judge that we were deadlocked and seeing that we did not have ample time to freely deliberate, the ten jurors for acquittal of all defendants except defendant COUGHLIN sought and finally reached a compromise verdict with jurors two and twelve at 9:30 p.m.

If there had not been a pressing time limit for deliberations, I would have held out for a hung jury but due to the facts stated I did not do so.

In a written opinion dated December 27, 1974, the trial court denied the motions (B.I. M1-10), stating in pertinent part:

* * * In United States v. Miller, 478 F.2d 1315, 1320 (2d Cir. 1973), cert. denied, 414 U.S. 830 (1973), the court indicated that the statements of trial judges to jurors must be "read in context" to determine whether they were coercive. * * *

> In the case at bar, the court was faced with the difficult problem of the trial lasting far longer than originally anticipated. Although the government originally estimated that presentation of its case would require three to four weeks (with five weeks as an outside limit, Trial Transcript at 3950), its presentation actually lasted ten weeks. The government and defense counsel shared responsibility for the unexpected length of the trial. Several weeks before the trial ended, the court was informed that several jurors had plans to leave for vacation in July. Consequently, the court repeatedly attempted to have counsel proceed as quickly as possible to avoid conflict between orderly presentation of the case and the vacation plans of the jurors * * * (B.I. M7-8).

With respect to the affidavit of Juror Canegallo, the court, relying on McDonald v. Pless, 238 U.S. 364 (1915); Mattox v. United States, 146 U.S. 140 (1892); United States v. Greico, 261 F.2d 414 (2nd Cir. 1958), cert. den., 359 U.S. 907, refused to intrude upon the secrecy of the jury deliberations to determine whether "the vacation plans of other jurors - led the affiant to agree to a compromise verdict."

In addition, the court noted that both at the time the jury was selected and just prior to their deliberations, he instructed all the jurors to "stick with"their own conclusion and to base their verdict solely on the evidence (B.I. M5-7). As we noted above, at the close of the evidence the trial court also instructed the jury "to determine in good conscience whether your fellow jurors'

argument is one commensurate with yours or whether you can with good conscience agree with him" (Tr. 4969; emphasis added).[26/]

Defendants contend that the judge coerced a verdict. An examination of the record shows that with the exception of counsel for acquitted codefendant John Macchirole, appellants never quarreled with the judge's method of encouraging expedition in this lengthy trial. Appellants never suggested that the jury be told that they would be required to deliberate as long as necessary and they objected when the government moved to have the jury sequestered during their deliberations. In light of this failure during trial to request curative action, appellants should not now be heard to complain.

Moreover, while other courts might have expedited this lengthy trial in a less unorthodox manner, we agree with the court below that a sufficient showing of coercion has not been made to justify invading the private deliberations of the jury, and that, in any case, the record (including the affidavit of Juror Canegallo) at most shows that Juror Canegallo was pressured by the other jurors in the privacy of the jury room--and not by the trial court. The affidavit plainly states that the jury was uncertain what action

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26/ In light of this instruction, the trial court's failure to instruct that the jurors should not "surrender [their] honest conviction . . . solely because of the opinion of your fellow jurors," (B.I. T.68), language which defense counsel did not take care to see that the court was aware of prior to the time he instructed the jury (Tr. 4973-4974), was harmless.

the court would take if they returned deadlocked.[27] It was precisely because they expected that the court would not cut short their deliberations that the jury resolved their conclicting points of view.

Far from putting coercion on the jurors - either on the two jurors with vacation plans or on the other ten jurors - the court's promise that the jurors would not have to deliberate beyond Tuesday, July 23, had to have just the opposite effect. The jurors knew that, come Tuesday night, they could quit where they were without fear of recrimination by the court, if the jury had been unable to reach a verdict, and without fear of subsequent pressure from fellow jurors into changing their vote for acquittal or conviction.

Similarly, Juror Canegallo's statement, in hindsight, that "If there had not been a pressing time limit for deliberations, I would have held out for a hung jury . . . " is illogical on its face. If in fact Juror Canegallo desired to "hold out" for a hung jury he should have been fortified by the knowledge that a predetermined end to the jury's deliberation was fast approaching.

In our view, the use of affidavits like the one produced here--which attempts to impugn the jury's private deliberations

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27/ We note that the court did not give an Allen-type charge.

by exposing the kinds of pressure which jurors regularly exert on each other, i.e., to be done with their jury service and return to their everyday affairs, and which does not identify any improper external contacts--is precisely the kind of action which induces "tampering with individual jurors subsequent to the verdict"; it tends "to produce bad faith on the part of a minority" in the jury; and it leads to jurors being harassed and besed by the defeated party." See Mattox v. United States, supra at 148; McDonald v. Pless, supra at 267-268. The privacy of the proceedings should not be invaded nor the verdict disturbed merely because a compromise may have been reached, McDonald v. Pless, supra at 267-269; Ingram v. Crouse, 322 F. Supp. 1328, 1330 (D.C. Kan. 1970), affirmed sub nom. Ingram v. Gaffney, 438 F.2d 532 (10th Cir. 1971), or because a juror subsequently changed his mind, United States v. Schroeder, 433 F.2d 846, 851 (8th Cir. 1970), cert. den. sub nom. Allen v. United States, 400 U.S. 1024 and 401 U.S. 943; United States v. Chereton, 309 F.2d 197, 200 (6th Cir. 1962), cert. den., 372 U.S. 936; see also Medina v. United States, 254 F.2d 228, 231 (9th Cir. 1958), cert. den., 358 U.S. 846.

In the final analysis, there is no reason not to believe that, as in any other trial, the jurors at defendants' trial did not follow the court's admonition to "determine in good

conscience" (Tr. 4970) the guilt or innocence of each defendant. 28/

28/ Defendants also contend (B.I. 33-36; B. III 6-7) it was error for the court to omit the names of certain co-conspirators from the indictment in reading substantive counts of the indictment to the jury. The names excised were those persons not tried with defendants and those as to whom a directed verdict of not guilty had been ordered by the court (Tr. 4938-4944, 4917-4972).

Prior to the reading of the charge, the judge asked counsel if they had any objections, other than those previously submitted in writing, to the proposed charge (Tr. 4934). Prosecutor Ritchie stated, "I take exception to the words 'moral certainty' in defining reasonable doubt", while the defense stated "We except to those requests that your Honor has decided not to charge" (Tr. 4934). The court then delivered the charge. At its conclusion Pacilio's counsel, Margulies, objected to the omission of names from the indictment, indicating that he had previously given that objection to the judge's clerk in writing (B.I. T62-65; Tr. 4971-4974). Other defense counsel did not join in his objection or indicate any other exceptions to the charge--defense attorney Verdiramo stating affirmatively that he had no exceptions (Tr. 4974). The court refused to recharge the jury, stating that the harm would thereby be compounded (Tr. 4972), and stating, out of the hearing of the jury (Tr. 4974):

> This Court submitted to the defendant's [sic] attorneys a full charge it intended to deliver to the Jury and at no time was there [sic] any exceptions made after the Court had been advised they were read.
>
> After the Court delivered the Charge to the Jury, at that time one of the defendant's [sic] attorneys, Mr. Margulies, steps forward and says he has exceptions to the Charge and that is totally unfair and totally unjustified and should not have been done.

Margulies then apologized (Tr. 4974).

Even if the defendants' objections were timely and not barred by F.R.Crim.P. Rule 30, defendants were not prejudiced by the court's action. Instead of reading to the jury a list of 12 names, which included persons either not tried with defendants or previously

[Footnote continued on next page]

CONCLUSION

It is therefore respectfully submitted that the judgment of the trial court should be affirmed.

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[Footnote continued prom previous page.]

acquitted, the court created the impression that the alleged offenses were of a much smaller scope (Tr. 4940, 4953-4955). In any event, as to Count 14, the only count of which all defendants save Coughlin were convicted, the names of all defendants were read to the jury (Tr. 4941-4942). See generally, United States v. Wolfson, 437 F.2d 862, 869 (2nd Cir. 1970).

Defendants further contend that the judge did not adequately charge the jury as to the use of hearsay testimony (B.I. 35-36). At no time did defendants object to the charge, nor do they allege that they submitted a proposed charge contrary to that given.

Their objections now would therefore be barred by F.R.Crim.P., Rule 30. In any event, their contention is without merit. The charge included general and specific cautionary instructions on the use of hearsay statements (Tr. 4955-4956, 4963-4965).

CERTIFICATE OF SERVICE

Copies of the foregoing Brief of Appellee have been served on counsel for appellants at the following addresses:

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Served this 30.th day of April, 1975

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